JD-05-10
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MID-ATLANTIC REGIONAL COUNCIL OF CARPENTERS,
an affiliate of the UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA

Employer

and Case 5-RC-16371

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 657

Petitioner Union

Gregory M. Beatty, Esq. of Baltimore, Maryland,
for the Regional Director.

Brian F. Quinn, Esq. of Washington, D.C.,
for the Employer.

Carey R. Butsavage, Esq. of Washington, D.C.,
for the Petitioner.

REPORT AND RECOMMENDATION ON OBJECTIONS

Robert A. Giannasi, Administrative Law Judge. Pursuant to a September 29, 2009 petition and an October 7, 2009 stipulated election agreement, the Board held a secret ballot election on October 30, 2009, in a unit of the Employer's picketing and handbilling employees.[1]

Of the approximately 135 eligible voters, 15 voted for petitioner, 75 voted against petitioner and 3 voted challenged ballots, which were not sufficient to affect the results. Petitioner filed timely objections. [2]

---

[1] The unit is defined as: "All full-time and regular part-time employees engaged in picketing, handbilling, demonstrating, and/or musical performance at sites in Washington, D.C., excluding all other employees, unpaid volunteers, office clerical employees, professional employees, guards and supervisors as defined in the Act."

[2] The objections are as follows:

1. Mid-Atlantic Regional Council of Carpenters, an Affiliate of the United Brotherhood of Carpenters and Joiners of America (hereinafter the "Employer", or the "Carpenters") by and through its agents and representatives, engaged in unlawful surveillance of employees, including videotaping employees' union activities during the critical period, thereby preventing a free and fair election.
2. The Carpenters, by and through its agents and representatives, threatened employees

Continued

On November 24, 2009, the Regional Director for Region 5 issued a notice of hearing on the objections. On December 8, 2009, I held a hearing on the objections in Washington, D.C. The parties filed post-hearing briefs. Based on the evidence submitted in that hearing, the stipulations and contentions of the parties, including their post-hearing briefs, as well as my assessment of the credibility of the witnesses, including their demeanor while testifying, I make the following findings and conclusions:

Objection 1—Alleged Unlawful Surveillance

In support of this objection, Petitioner offered the testimony of Raymond Diaz, one of its organizers. His testimony dealt with four instances of alleged objectionable conduct based on alleged surveillance and interference with protected activity during the non-work time of employees. The Employer countered with testimony from witnesses of its own denying that the Employer engaged in objectionable conduct. No unit employees testified in support of this objection—or indeed any of the objections.

Diaz testified that, on October 14, the Employer's employees were picketing at and near a construction site at the corner of 19th and K Streets in Washington. According to Diaz, that morning, he and another organizer, Alex Guzman, were talking to employee Fred Bennett, who was tasked with feeding the parking meters of cars of the Employer's representatives about two or three hundred feet from the picketing site. At some point, Neri Canahui, an admitted agent and supervisor of the Employer, approached the three individuals, who were on a public sidewalk. Canahui had a video camera and filmed at least part of the conversation. Bennett told Petitioner's organizers, more than once, that he had to leave to go to the picket line; and he did so. According to Diaz, Canahui told the two representatives of Petitioner not to talk to his employee while he was working; and, on cross-examination, Diaz admitted that Canahui told him that he could talk to the employee when he was not working.

Canahui credibly testified that, because of confrontations that had occurred in the past and therefore might occur during picketing, he carries a video camera as part of his job supervising picket lines for the Employer. That testimony was supported by two other witnesses

---

with more onerous working conditions, including instituting mandatory drug testing if they supported Local 657, during the critical period, thereby preventing a free and fair election.

3. The Carpenters, by and through its agents and representatives, threatened employees with job loss if they voted for local 657, thereby preventing a free and fair election.
4. The Carpenters, by and through its agents and representatives, promised employees benefits if they refrained from supporting local 657 during the critical period, thereby preventing a free and fair election.
5. The Carpenters, by and through its agents and representatives, interrogated employees concerning their union sympathies during the critic al period, thereby preventing a free and fair election.
6. The Carpenters, by and through its agents and representatives, intimidated employees before and during the election held on October 30, 2009.
7. Because of confusion over the location of the polling place, many votes did not cast ballots or were confused about where they could cast ballots, thereby interfering with the conduct of a free and fair election.
8. Because of lack of proper identification, certain employees voted more than once in the election, thereby interfering with conduct of a free and fair election.

who confirmed that video cameras were used by the Employer to document possible confrontations on the picket line. Accordingly, Respondent's actions in using video cameras were perfectly reasonable and not inherently coercive.

Canahui testified that, on October 14, he assigned Bennett to watch the parked car of one of the Employer's agents at the corner of 19th and K Streets, near the picket line. Canahui also credibly testified that, when Bennett was approached by Diaz and Guzman, Bennett had signed in and was working. Indeed, the picket line was up and running. At this time, Canahui did not know who Diaz and Guzman were, and, when he observed the three men talking, he noticed Bennett throwing his arms in the air. Fearing a possible altercation, he walked over to the men and started filming with his video camera. The video disk was introduced into evidence, and, having viewed it, I find that it tends to support Canahui's testimony. A picketer appears on the video returning to the picket line after have gone to the bathroom in a nearby building. And Bennett appears to be arguing with Diaz and Guzman and asking them to leave him alone. The video does not corroborate Diaz's account of the situation.

Where the testimony of Diaz and Canahui conflicts, I credit Canahui, whose testimony was straightforward, more complete, and supported in part by the video. I do not credit Diaz's testimony that his conversation with Bennett took place while the latter was not on work time. Diaz himself observed that Bennett was assigned to watch cars. Diaz was not a candid or reliable witness. I noted, for example, that only on cross-examination did he acknowledge that Canahui told him he could talk to Bennett on non-work time.

In my view of the incident, I find that Canahui did not engage in surveillance or conduct that would tend to coerce employees. His actions were perfectly reasonable and nothing that he did amounted to objectionable conduct that would have adversely affected the election results.

Diaz testified about a second incident that occurred on October 22, while he was meeting with some of the employees during a break outside a deli or coffee shop near 19th and L Streets. According to Diaz, Canahui was standing near his car in a public area about 50 feet away and some of the employees told him they felt "stalked." Significantly, Diaz's reference to employees telling him they felt "stalked" was not contained in the affidavit he submitted in support of the objections. Canahui's explanation is more benign and it was not controverted by Diaz. According to Canahui, on October 22, Canahui and an associate left the site of the morning's picketing and parked their car near the afternoon picketing site, which was also near the deli or coffee shop where Diaz was meeting with employees. Canahui testified that, while he was standing outside, but near the car, Diaz shouted his name and asked if he wanted to join them. Canahui declined.

Here again, where the testimony of Diaz and Canahui conflicts, I credit Canahui. Diaz's testimony was not as complete as Canahui's and his exaggerated reference to being told the employees felt "stalked" was not only not contained in his affidavit, but seemed to me to be an attempt by Diaz to make the incident more significant than it was. But, in either case, I find nothing coercive in Canahui's appearance near the employees on break at the deli or coffee shop. He was close to the parked car that served as the headquarters for the Employer's afternoon picketing, which was nearby both the parked car and the deli or coffee shop where the employees were meeting with Diaz. He neither did nor said anything to interfere with Diaz's meeting with the employees. All of the individuals involved were outside, including the employees and Diaz, who were sitting in the outdoor portion of the deli or coffee shop. There was nothing out of the ordinary in Canahui's presence at this location and nothing that he did had the tendency to coerce employees.

Diaz also testified about a third incident at the 19th and K picket line on October 29. According to Diaz, he approached the picket site, and began talking to the employees. While he was talking to the employees, another agent of the Employer, Raul Castro, approached them with a video camera in his hand. One of the employees said that he had to "get back to the line" and Castro told Diaz not to talk to his employee while he was working. Diaz insisted that this took place before the picketing actually started.

Castro also testified about this incident. He acknowledged that he, like Canahui, carried a video camera because of possible confrontations. But on this occasion, according to Castro, the camera was not being used and simply hung from his neck. He heard an argument between Diaz and an employee named George Garrett and he approached them. He did not say anything and did not do any videotaping. By the time Castro reached Diaz and Garrett, the argument had broken up, and he simply moved away.

I am not sure that Diaz and Castro were testifying about the same incident. But because I found Diaz unreliable in describing earlier incidents, I would not credit him to the extent his testimony conflicts with that of Castro, who appeared to me to be the more credible and reliable witness. In any event, it is clear that Castro did not videotape anything and, even under Diaz's version of events, simply told him not to talk to employees while they were working. I do not credit Diaz's testimony that the employees were not working when he was talking to them. It is clear from all of the testimony, particularly in the mutually corroborated accounts of Canahui and Castro, that the Employer's agents only intervened when Petitioner's agents tried to talk to employees when they were on work time. Accordingly, I find nothing objectionable in Castro's intervention on this occasion. Nor did anything that he did have the tendency to coerce employees.

The final allegation in this objection involved an incident that occurred on October 30, the day of the Board election. According to Diaz, he and another agent of Petitioner were talking to employees before the start of picketing at another site, not that at 19th and K. Canahui and Castro approached Petitioner's agents and told them not to talk to the picketers while they were working. Diaz responded that the picketers were not yet on the clock. According to Diaz, the picketing at that location was to begin a bit earlier than the normal 10:30 start time because the employees were to be excused to vote in the election, which was to begin at noon. Diaz, however, admitted that he did not know the "exact details" about when the picketing began on this occasion. As I have indicated before, I did not find Diaz to be a reliable witness, and I specifically find him not to be reliable when he testified, as he did here, about talking to the employees before their work time. In addition, Diaz admittedly was unclear about the details of when the picketing began. In any event, both Castro and Canahui credibly testified about this incident and their testimony was mutually consistent. Both insisted that they intervened only when the Petitioner's agents talked to the employees on work time. Moreover, Canahui testified that, when the time came for the picketing to begin, he pointed to his watch to indicate to Diaz that it was time for him to stop talking to the employees. This was something he had repeatedly done when cautioning Diaz to stop talking to employees because they had to work. He had his video camera in his hand, but he was not operating it. This likewise was credible testimony. In these circumstances, here again, I cannot find anything objectionable or coercive in the Employer's intervention in the October 30th incident.[3]

[3] At the hearing, Petitioner withdrew the last part of Objection 1, that alleging an impropriety by Canahui on October 31.

Based on my credibility determinations and findings set forth above, I shall recommend that Objection 1 be dismissed in its entirety.

Objections 2, 3, 4 and 5

In these objections, Petitioner relies on statements made by the Employer in two handbills distributed to employees, which allegedly contained promises and threats that interfered with the election. Petitioner also alleged in these objections that another handbill contained improper statements and that certain employees were threatened and promised benefits, but no evidence was submitted at the hearing involving those allegations. Accordingly, any objections based on those allegations are overruled. Thus, the only evidence in support of these objections is the two handbills that were received in evidence as Petitioner's Exhibits 1 and 2.

The first of the two handbills mentioned above sets forth portions of Petitioner's uniform hiring hall procedure, together with a statement of its purpose—"to eliminate the evils of casual employment." The handbill also contained comments from the Employer showing how the language from the hiring hall procedure could redound to the detriment of employees because it might prevent the Employer from hiring its employees directly, as it does at present. A second handbill made some of the same points and added a quote from an officer of Petitioner that stated Petitioner's policy was to keep its members and jobsites "drug and alcohol free." Presumably, Petitioner alleges that the first handbill threatened a change in hiring policy and the second promised a loss of benefits, a tightening of a loose policy on drugs and alcohol use.

I find nothing in the handbills that amounts to an objectionable threat or promise. The Employer fairly and accurately informed employees of the requirements of Petitioner's hiring hall policy. There is no dispute that the Employer accurately set forth language from the Petitioner's hiring hall policy and its purpose. After accurately setting forth that language, the Employer made reasonably based arguments that, if the Petitioner's hiring hall procedures were applied to the employees, the employees might suffer because their hiring would become more complicated. While it is true that Petitioner's hiring hall was generally applicable to construction employees, not to the type of work the picketers were doing, the Petitioner's rationale for the use of a hiring hall—"to eliminate the evils of casual employment"—certainly applied to the unit employees. The Employer was simply arguing that casual employment was better for its employees than the use of a hiring hall. The Petitioner was certainly free to argue that the hiring hall analogy did not fit the employees involved here and to plainly state that it would not use its hiring hall procedures in representing these employees. And the employees were, of course, free to assess the arguments on each side of the issue.

Nor was there anything improper about the Employer's reliance on Petitioner's policy against drugs or alcohol. Here again, there is no dispute that the Employer accurately represented quoted language from one of Petitioner's officials about Petitioner's policy on drugs and alcohol. It is also clear from the evidence submitted at the hearing that the Employer did have a policy against drugs or alcohol on the job and it did send employees home for violations of that policy. It appears, however, that a campaign issue was whether Petitioner's policy, if it won bargaining rights, would have been stricter that the Employer's policy without a union. Although it is odd to contemplate a campaign issue that might turn on which side was easier on drugs and alcohol, comments by either side on this issue were fair game, absent threats or promises that would unduly affect employee choice. Nothing in the handbills amounted to improper threats or promises about drug or alcohol policies.

In these circumstances, I will recommend that Objections 2, 3, 4 and 5 be overruled.[4]

Objections 7 and 8

These objections allege that voters were confused over the location of the polling place on the day of the election and that certain employees voted more than once, thus compromising the election. The evidence in support of these objections falls far short of showing improper conduct.

The election was held in the office of one of the Employer's constituent local unions on the first floor of a building at 1100 New York Avenue. According to Diaz, he saw a Board agent come out of the building and tell a group of employees who were assembled outside, "Hey guys, make sure you're only voting once." Another representative of the Petitioner, Mathew Traldi, also testified about the circumstances of the election. According to Traldi, he was assigned to represent the Petitioner in the pre-election conference. He testified that there was no sign in the lobby telling employees where to go to vote. He then spoke to one of the Board agents conducting the election about what he considered confusion about the voting location within the building. On cross-examination, Traldi admitted that there was a sign on the doors leading to the room in which the polling took place and that that was the only place in the building where an election was being held. He also admitted that the Board agent, after consulting both sides, directed that an individual be designated to go outside the building and direct employees into the building and to the actual polling location. That employee, Alan Jones, testified in this proceeding. He testified he remained outside until the end of the voting and complied with the instructions of the Board agent. Another official of the Employer, George Eisner, confirmed the arrangement to send Jones outside the building to direct employees to the voting site. Traldi admitted that he interposed no objection to the procedure decided upon by the Board agent to ensure that the employees were not confused about the polling place—the designation of employee Alan Jones to stand outside the building and direct employees to the voting site.

As I have indicated, nothing in the Petitioner's evidence shows any improprieties in the location of the election. Any possible confusion about the specific location of the voting site was resolved by sending employee Alan Jones outside to direct employees to the proper location. As for the allegation that employees might have voted more than once, the only evidence submitted was Diaz's testimony about the Board agent's statement cautioning employees to only vote once. That statement standing alone means nothing. There was no evidence that anyone actually voted more than once. Any suggestion that there was sufficient confusion to affect the election is rebutted by the fact that, of the 135 eligible voters, some 83 actually cast ballots. Indeed, the Petitioner lost the election by such a wide margin that not only a majority of voters who cast a ballot, but also a clear majority of the eligible voters, rejected unionization. In these circumstances, I recommend that Objections 7 and 8 be overruled.

Conclusion

Based on the above findings and analysis, I recommend that the Petitioner's objections be overruled in their entirety and that the election be deemed fair and valid. Accordingly, I issue the following recommended:

[4] At the hearing, Petitioner withdrew Objection 6.

Order[5]

The appropriate certification of the results of the election should be issued.

Dated at Washington, D.C., January 15, 2010.

_____
Robert A. Giannasi
Administrative Law Judge

[5] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C., within 14 days of issuance of this report and recommendation. Exceptions must be received by the Board in Washington by January 29, 2010. Immediately upon the filing of such exceptions, the party filing them shall serve a copy upon the other parties and shall file a copy with the Regional Director of Region 5. If no exceptions are filed, the Board may adopt this report and recommendation.